The Code as it stands needs much revision, and even when it is adequately modified it will not secure the immediate support of the great maritime powers, which alone could make it effective. But its mere formulation indicates the desires and the ideals of the neutrals furthest from the seat of the present war; the last century has seen the gradual incorporation of neutral ideals into international law; and the three great principles the Code embodies — the abolition of blockade, the immunity of ships, and the force-equipped conference of neutrals — may eventually become part of the law of nations.

THE LABOR PROVISIONS OF THE CLAYTON ACT. — The labor sections of the Clayton Anti-Trust Act [1] were intended, according to the Judiciary Committees of the Senate and House, respectively, "to exempt labor . . . organizations from the operation of the anti-trust acts," and "to constitute for labor a complete bill of rights in equitable proceedings in the United States Courts." [2] Organized labor is naturally relying upon the Act as a charter of immunities.[3] Some current criticism, however, holds the Act entirely futile, a mere declaration that what is lawful is lawful.[4] An intermediate view seems justifiable, — that the Act accomplishes some things, particularly by way of removing uncertainties in the law.[5]

The Act attacks the problem of the labor dispute in the law from two angles, from the side of the substantive federal law of restraint of trade, and from the side of the remedy in the federal courts for threatened injury. The one side concerns the prohibitions of the Sherman Anti-Trust Act, the other, the issuance of injunctions by federal courts in labor disputes.

There can be no intelligent discussion of the effect of the Clayton Act on the Sherman Act as applied to labor unions without careful consideration of the position of the labor union at common law and under the Sherman Act. At the outset it is necessary to appreciate that a combination of sellers of labor to raise the price of their commodity and otherwise to regulate the terms of its exchange must of necessity impose some restraint on the freedom of the buyer of labor to trade in the labor market. This restraint, however, the common law had come to regard as inevitable, and justified by the necessities of collective bargaining. Therefore, by the weight of authority, such a combination, without more, was not considered to be a combination in restraint of trade,[6] nor did it become

[1] 38 STAT. AT L. 730.

[2] Sixty-third Congress, 2d Sess., SENATE REPORT, No. 698, pp. 2, 12.

[3] See Mr. Samuel Gompers, in the AMERICAN FEDERATIONIST, Oct., 1914.

[4] See THE NEW REPUBLIC, Dec. 2, 1916.

[5] See SENATE REPORT, *supra*, 25. "The necessity for legislation . . . arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules." And see p. 33, "The bill does not interfere with the Sherman Anti-Trust Act at all."

[6] Master Stevedores' Ass'n *v.* Walsh, 2 Daly (N. Y.) 1. See 28 HARV. L. REV. 696. *Cf.* More *v.* Bennett, 140 Ill. 69, 79, 29 N. E. 888, 891, in which case, however, the court found a monopoly purpose which would seem to class the case with those cited *infra*, note 12.

one by pursuing its object by striking[7] and by peacefully inducing others to strike,[8] or by concertedly refusing to patronize the employer and by peacefully persuading others so to do.[9] These were lawful methods of competition. If, however, the combination sought its end by fraud, violence, or intimidation, even of the sort found in the "secondary boycott," [10] the restraint imposed on the buyer by its tortious conduct was not regarded so indulgently, and the combination was in restraint of trade.[11] If, furthermore, the purpose of the combination was not merely to better the terms of the exchange, but also to drive all independent sellers of labor out of the market, to coerce them into joining the combination, to achieve a monopoly of the labor market, then also the combination was in restraint of trade,[12] and all its acts in furtherance of its un-

[7] The cases in which the legality of the strike, etc., at common law has been considered are tort cases for damages or injunction. But they have to do with restraints imposed by the combination on the freedom of individuals to trade in the labor market. The liability of the combination in tort is often put on the same considerations of public policy which determine the question of restraint of trade. See Pickett *v.* Walsh, 192 Mass. 572, 579, 78 N. E. 753, 756; Longshore Printing and Publishing Co. *v.* Howell, 26 Ore. 527, 538, 38 Pac. 547, 550; Saulsberry *v.* Coopers' International Union, 147 Ky. 170, 143 S. W. 1018; Wabash R. Co. *v.* Hannahan, 121 Fed. 563, 567.

[8] See Everett Waddey Co. *v.* Richmond Typographical Union, 105 Va. 188, 53 S. E. 273. The closely related question of "picketing" for the purpose of peacefully obtaining or giving information, is generally decided similarly. See Karges Furniture Co. *v.* Amalgamated Woodworkers' Local Union, 165 Ind. 421, 430, 75 N. E. 877, 880; Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45, 51. But the question is confused by the close approach of the law of nuisance, and the great opportunity for intimidation. Courts have a tendency to hold that there cannot in nature be such a thing as "peaceful picketing." See Atchison, etc. Ry. Co. *v.* Gee, 139 Fed. 582, 584; Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077; 15 HARV. L. REV. 482.

[9] See American Federation of Labor *v.* Bucks Stove & Range Co., 33 App. D. C. 83, 116.

[10] By the "secondary boycott" is meant action a step removed from mere persuasion of third parties not to patronize the employer, — in other words, the phrase is used to mean intimidation or coercion of third parties by threat of temporal loss, — the "conscription of neutrals." See American Federation of Labor *v.* Bucks Stove & Range Co., *supra*, note 9. Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418; Pickett *v.* Walsh, 192 Mass. 572, 587, 78 N. E. 753, 759; Fink *v.* Butchers' Union, 84 N. J. Eq. 638, 95 Atl. 182; Wilson *v.* Hey, 232 Ill. 389, 396, 83 N. E. 928, 929; 29 HARV. L. REV. 86; 17 HARV. L. REV. 558.

[11] "Complainants were engaged in a lawful business. . . . The law protects them in the right to employ whom they please, at prices they and their employees can agree upon, and to discharge them at the expiration of their terms of service or for violation of their contracts. This right must be maintained, or personal liberty is a sham. So, also, the laborers have a right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly, or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars, in a peaceable way, with no attempt at coercion. . . . The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion. The right to trade and the personal liberty of the employer alone are not involved in this case; the right of the laborer to sell his labor when, to whom, and for what price he chooses is involved." "May these powerful organizations thus trample with impunity upon the right of every citizen to buy and sell his goods or labor as he chooses? This is not a question of competition, but rather an attempt to stifle competition." Beck *v.* Teamsters' Union, 118 Mich. 497, 516, 521, 77 N. W. 13, 21, 22.

[12] More *v.* Bennett, 140 Ill. 69, 29 N. E. 888. See Master Stevedores' Ass'n *v.* Walsh, 2 Daly (N. Y.) 1, 10; Brennan *v.* United Hatters, 73 N. J. L. 729, 739, 65 Atl. 165, 169; Russell *v.* Carpenters & Joiners, [1910] 1 K. B. 506, 515. Here also the language of the

lawful object, whether or not they were of themselves tortious,[13] must have been tainted with the same illegality.

Into this situation came the Sherman Act,[14] which declared that all combinations in restraint of trade between the several states were illegal by federal law, and subject to severe penalties at the suit of the United States or of any person damaged. The meaning of restraint of trade in the Act has been referred to the common law; [15] and the Act has been construed to condemn any combination in restraint of trade which directly interferes with the free flow of interstate commerce.[16] It would seem that the labor union, then, which has so conducted itself as to be in restraint of trade at common law, might come within the prohibition of the Sherman Act on either of two grounds, — interference with the flow of labor from state to state,[17] or interference with the flow of a manufactured product.[18]

---

courts is significant in tort cases, — cases in which the defendant union was fighting for the "closed shop," with a more or less evident monopoly purpose. "If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands, or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly. The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly." Berry *v.* Donovan, 188 Mass. 353, 359, 74 N. E. 603, 606. See also Gatzow *v.* Buening, 106 Wis. 1, 12, 81 N. W. 1003, 1006; State *v.* Stewart, 59 Vt. 273, 289, 9 Atl. 559, 568; Hitchman Coal & Coke Co. *v.* Mitchell, 202 Fed. 512, 529.

[13] It would seem that any acts of such an illegal combination which cause damage or which threaten irreparable injury should give grounds for recovery or injunction. Thus it has been held that even a strike in these circumstances is tortious. Plant *v.* Woods, 176 Mass. 492, 501, 57 N. E. 1011, 1014; Erdman *v.* Mitchell, 207 Pa. St. 79, 92, 56 Atl. 327, 332. The New Jersey courts, on the other hand, hold the contrary, while at the same time recognizing that "it is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to secure to every dealer on either side of the market." Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 766, 53 Atl. 230, 233. So also Kemp *v.* Division No. 241, 255 Ill. 213, 226, 99 N. E. 389, 394. See 26 HARV. L. REV. 259. Compare National Protective Ass'n *v.* Cumming, 170 N. Y. 315, 326, 63 N. E. 369, 371, with Jacobs *v.* Cohen, 90 N. Y. Supp. 854. See 18 Harv. L. Rev. 471. See also National Fireproofing Co. *v.* Mason Builders' Ass'n, 169 Fed. 259, 263.

The doubtful act of picketing is tortious in these circumstances. Jonas Glass Co. *v.* Glass Bottle Blowers' Ass'n, 72 N. J. Eq. 653, 664, 66 Atl. 953, 957; Pierce *v.* Stablemen's Union, 156 Cal. 70, 77, 103 Pac. 324, 328. And the "secondary boycott" is generally regarded as tortious under any circumstances. Loewe *v.* Cal. State Federation, 139 Fed. 71; Irving *v.* Joint District Council, 180 Fed. 896, 900; Casey *v.* Cincinnati Typographical Union, 45 Fed. 135, 143; Gray *v.* Building Trades Council, 91 Minn. 171, 179, 97 N. W. 663, 666; Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 445, 114 S. W. 997, 1003; Purvis *v.* United Brotherhood, 214 Pa. St. 348, 63 Atl. 585. California and Montana are *contra*. Parkinson *v.* Building Trades Council, 154 Cal. 581, 98 Pac. 1027; Lindsay & Co. *v.* Mont. Fed. of Labor, 37 Mont. 264, 96 Pac. 127.

[14] C. 647, 26 STAT. AT L. 210.

[15] See Standard Oil Co. *v.* U. S., 221 U. S. 1, 60; U. S. *v.* American Tobacco Co., 221 U. S. 106, 179.

[16] See Eastern States Retail Lumber Dealers' Ass'n *v.* U. S., 234 U. S. 600, 609.

[17] See Hitchman Coal & Coke Co. *v.* Mitchell, 202 Fed. 512, 530, 556.

[18] Loewe *v.* Lawlor, 208 U. S. 274; Lawlor *v.* Loewe, 235 U. S. 522; Irving *v.* Neal, 209 Fed. 471; Paine Lumber Co. *v.* Neal, 212 Fed. 259. Another somewhat different ground is actual interference with the operation of interstate common carriers. U. S.

What, then, is the effect of the Clayton Act on the situation? The pertinent sections are six and twenty. Section six provides "that the labor of a human being is not a commodity or an article of commerce." This clause would seem to prevent any labor combination from falling within the prohibition of the Sherman Act on the ground that in its attempt to monopolize the labor market it had interfered with the flow of labor from state to state. Section six continues: "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." If the anti-trust laws are not to restrain members from lawfully carrying out the legitimate objects of the combination, it is clearly implied that they are still to restrain them from *unlawful acts* carrying out the legitimate objects of the combination,[19] or from *any* acts carrying out an *unlawful object* of the combination. The result is that, except for the first clause, section six leaves the Sherman Act effective just where it was effective before. Moreover, since such unlawful labor combinations must usually interfere with interstate commerce in some commodity, the first clause, removing labor from the category of goods in interstate commerce, is of no practical significance.

Section twenty (second paragraph) enumerates, beginning with striking and peacefully persuading others to strike, a list of specific acts, which it provides shall not "be considered or held to be violations of any law of the United States." The list does not include the "secondary boycott," and is made up exclusively of acts which, by the weight of authority, as suggested above,[20] did not, as such, amount to restraint of trade. Among the acts enumerated is "persuading others by peaceful and lawful means" to cease to patronize any party to the dispute. This implies that persuasion by violent or unlawful means is still within the prohibition of the federal law. Nor is there any intimation that the hitherto illegitimate monopoly object is to be legalized contrary to the clear implication of section six. The net result of section twenty, then, on this matter, is also to leave the prohibitions of the Sherman Act untouched; the labor union which restrains interstate trade by unlawful acts, or by the pursuit of an illegitimate end, is still liable to the fate of the Danbury hatters. This is not to say that section twenty is entirely futile; it at least gives legislative backing to the *prima facie* innocent character, so far as restraint of trade under the Sherman Act is concerned, of the acts enumerated, in regard to which there was still some difference of judicial opinion at common law.[21]

The Clayton Act affects the remedy in the federal courts for threatened injury in labor disputes by limiting and regulating the issuance of

---

v. Workingmen's Amalgamated Council, 54 Fed. 994, 1000. Unfortunately, the Debs case went off on another ground. *In re* Debs, 158 U. S. 564, 600.

[19] A declaration alleging such acts was recently held still to state a cause of action under the Sherman Act. Dowd *v.* United Mine Workers, 235 Fed. 1, 7, 13, 16.

[20] *Supra*, notes 7 to 9.

[21] This is particularly true of the act of "picketing." See *supra*, n. 8.

injunctions, and by regulating procedure for contempt. Sections sixteen to nineteen pertain only to injunctive relief against threatened damage from a violation of anti-trust acts,[22] and do not depart essentially from federal equity practice. Section twenty, however, is more vital. The first paragraph provides that no federal court shall issue any injunction in any labor dispute "unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law." "Property right" is broad enough to ground almost any application for injunctive protection likely to arise in a labor dispute; this provision, then, does no more than state the grounds on which courts of equity are accustomed to act. The second paragraph provides that "no such restraining order or injunction shall prohibit" any of the enumerated acts. The same considerations which were suggested above regarding this part of section twenty must apply here. The union which uses violent or unlawful means may still be enjoined; and so also the union which seeks an unlawful object, as monopoly, although the only overt acts fall within the list enumerated. There is nothing to indicate that federal courts of equity are deprived of power to deal with striking and persuading to strike, etc., when these acts are part of an unlawful scheme: under these circumstances the most innocent acts may take on a new complexion.[23] Sections twenty-one to twenty-five deal with contempts of court committed out of the court's presence. The application of the provisions is not extensive. They do not apply to contempt of any order issued in any prosecution by the United States, or to any act of contempt which is not also a crime under the laws of the United States or of the state where committed. In other cases the accused may on demand secure trial by jury, his punishment is limited to $1000 and six months, and on conviction the evidence may be reviewed on writ of error. It may be questioned whether the right to a change of venue to some judge other than the one who issued the contemned order would not have been as fair as this, and more effective, considering the certainty of a divided jury which exists in labor cases. Appeal on the facts, as in an ordinary chancery case, would have been more substantial than writ of error. At any rate, the reason for the arbitrary restriction of the benefits of the reformed procedure to so small a class of offenders is not apparent, granting the sincerity of the draughtsmen of this bill of rights.

The accomplishments of the Clayton Act fall far short of the promise. Before compelling pressure is brought on Congress and state legislatures for further immunity from the law, it might be well to consider whether the real remedy for the bitterest and most wasteful struggle of modern society — in times of peace — is for the law to withdraw its hand, or whether some measure of compulsory arbitration would not be more

[22] These sections provide a detailed regulation of temporary restraining orders, require notice before the granting of a preliminary injunction, and specific and detailed description of all acts enjoined, and limit the effectiveness of the order to persons "in active concert or participating with" parties to the suit, and who shall have received actual notice thereof.

[23] See Taft, Circuit Judge, in Toledo, etc. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 730, 737.

regardful of the interests of the general public.[24] To allow labor disputes to settle themselves by protracted struggles of might smacks of the primitive administration of justice by self-help.

EQUITABLE RELIEF FOR UNILATERAL MISTAKE OF FACT. — It is a fundamental principle that a party may not escape an obligation imposed by a formal contract, into which he voluntarily entered, merely because he has made a "hard bargain." [1] Where the negotiations of the parties are expressed in writing, their intention to contract is, of necessity, judged objectively.[2] But as mistakes are more or less common in everyday affairs, it is expedient that relief from such an ironclad rule be granted in certain cases. This is a true function of equity, and affirmative relief is obtainable through the remedies of reformation and cancellation.

A mistake of fact may be bilateral, common to both parties, or unilateral, a mistake of one party only. Where the parties have executed an instrument under a mutual erroneous belief in the existence of the subject matter, it would obviously be inequitable to allow either to demand performance.[3] Again, if the terms of a contract are ambiguous and each reasonably takes a different view as to the identity of the subject matter, there is no real meeting of the minds and neither should be allowed to force his interpretation upon the other.[4]

Where the parties have made a real agreement, but there has been a mutual mistake in reducing it to writing, neither should be allowed to profit thereby. Such a mistake does not invalidate the agreement, as equity will reform the instrument so as to express the true intent of the parties.[5] Such reformation may be made by a court of equity even where the Statute of Frauds requires such contracts to be in writing.[6] Likewise, where one party knew of the mistake in the instrument at the time of execution, he cannot be heard to say that the mistake was not mutual; equity will reform the instrument so as to conform to the agreement actually made or determined upon to be the real purpose and intention of the parties.[7]

A more difficult question arises where the mistake in the original agreement [8] is that of one party only. It is clear that there can be no

[24] See Henry B. Higgins, "A New Province for Law and Order," 29 HARV. L. REV. 13.

[1] But equity may refuse to enforce the specific performance of a contract, the result of which would be to impose great hardship on either party. Falcke *v.* Gray, 4 Drewry 651, 660. See FRY, SPECIFIC PERFORMANCE, part 3, c. 6.

[2] "Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." Holmes, J., in O'Donnell *v.* Clinton, 145 Mass. 461, 463. See Stoddard *v.* Ham, 129 Mass. 383.

[3] Hitchcock *v.* Giddings, 4 Price 135; Fritzler *v.* Robinson, 70 Ia. 500, 31 N. W. 61.

[4] Raffles *v.* Wickelhaus, 2 H. & C. 906; Kyle *v.* Kavanagh, 103 Mass. 356.

[5] Fowler *v.* Fowler, 4 De G. & J. 250. Thus, where the parties made an erroneous mathematical calculation, the instrument was reformed. Dunn *v.* O'Mara, 70 Ill. App. 609.

[6] For a full discussion of this question, see 2 POMEROY, EQ. JURIS., §§ 864–867.

[7] Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293; Welles *v.* Yates, 44 N. Y. 525.

[8] There is always a preliminary question of fact whether the parties intended to be